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DISCUSSION DOCUMENT: CONSTITUTIONAL PRINCIPLES AND STRUCTURES FOR A DEMOCRATIC SOUTH AFRICA

by

the African National Congress of South Africa

[Note: This issue is published in pursuance of the Declaration on Apartheid and its Destructive Consequences in Southern Africa adopted by consensus on 14 December 1989 by the United Nations General Assembly at its sixteenth special session.

It contains a discussion document recently prepared by the Constitutional Committee of the African National Congress of South Africa (ANC), which is divided into two parts: the constitutional principles for a democratic South Africa; and the structure of a constitution for a democratic South Africa.

The views expressed herein are those of the author.]

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INTRODUCTION

Right of all South Africa's people to participate in constitution making

The African National Congress of South Africa (ANC) believes that all the people of South Africa should participate in the process of drawing up and adopting a new constitution for the country. This principle is enshrined in the demand for a constitutent assembly made up of mandated representatives of the people elected in non-racial elections.

To assist this process of popular participation and ensure that discussion is not restricted to so-called experts, the ANC Constitutional Committee, on the instruction of the National Executive Committee, published various documents, inter alia:

"What is a constitution?" - to identify issues in the constitution-making process; and

"A draft Bill of Rights" - to identify fundamental human rights that should be enshrined in a Bill of Rights.

The objective of these documents was not to produce blueprints or position, but to assist our people in discussions around constitution-making to enable them to work out for themselves what they want to see in a new constitution and what they would like to see incorporated in a Bill of Rights.

A number of conferences, workshops and discussion meetings were also held over the last few months. Working papers on electoral systems, gender issues, local government, the land question, etc. were also prepared.

All these documents were widely distributed to all branches and regions, as well as to trade unions and other formations within the broad democratic movement.

Comments, criticisms and suggestions were invited. As a result of the discussions, inputs and responses received, the ANC Constitutional Committee has been able to formulate documents identifying principles and a possible structure for a new constitution. These documents reflect the views and responses received thus far.

In this package, therefore, will be found two documents: "Discussion document on constitutional principles"; and "Commentary on the structure of a constitution for a democratic South Africa".

We also make the following observations:

(a) While the documents reflect the broad thinking within ANC and allied organizations, they are not put forward as final positions or blueprints. They are meant for discussion and debate within the ANC branches, trade union movement and allied organizations - and indeed amongst all South Africa's people. We want to see our people, through their organizations, grapple with the ideas contained in the documents and come up with their own suggestions

and criticisms. This will enable ANC to arrive at a set of proposals based on the will of the people.

(b) Specific attention is drawn to some areas of discussion:

(i) Should South Africa have a ceremonial president and a prime minister answerable to parliament, or an executive president (without a prime minister), answerable to parliament? The method of presentation of the issue in the documents does not mean that finality has been reached. The issue is open and must be discussed;

(ii) How is the president to be elected? By direct elections, or by parliament?;

(iii) What provisions should be included to avoid overcentralization and ensure democratic participation in government at central, regional and local levels. Also, what provisions could be included to ensure structured accountability of all officials and organs of government?;

(iv) What should be the structure of parliament? Should it be bicameral (two houses, e.g., national assembly and senate) or unicameral (one house)? In either event, how will representatives be elected and what will be the function of the house(s). In the documents we make provision for two houses, but this also is still an open question;

(v) Judiciary and administration of justice. This has been a burning issue in our country. We have a judiciary and a system of justice that are illegitimate. How to deal with these aspects represents a major problem. There is no final answer to this and the discussion in our documents represents an attempt to grapple with the problem.

It is imperative that branches, regions, trade unions, democratic formations generally, as well as a broad spectrum of our people - sympathetic or unsympathetic - discuss the issues raised and submit comments, criticisms and suggestions.

The question may be asked: Why not leave all these discussions to a constituent assembly? Are we not pre-empting the constituent assembly? Our answer is that we do see the constituent assembly as the mechanism that must adopt a new constitution. However, discussion on all constitutional issues must take place now to ensure that representatives to a constituent assembly are fully informed and mandated, and that popular participation in constitution-making is real. To postpone discussion on all these important issues until a constituent assembly is convened, will in reality mean that people would not be participating in the process.

In addition, it is clear that in the negotiation process, the various parties will be meeting to discuss the principles on which a new constitution should be based. In Namibia, the principles were imposed by the Contact Group and the constituent assembly was bound to work within the framework of those principles. We need to ensure that principles are not imposed upon our people but arise as a result of popular participation.

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ANC appeals to all branches, trade unions, democratic formations and people generally to discuss these matters now. We invite comments, suggestions and criticisms. Send them to:

Zola Skweyiya
Chairperson
Constitutional Committee of ANC
c/o The Publisher Centre for Development Studies
University of the Western Cape
Private Bag X17
Bellville 7535, South Africa

Tel: 959-2317/2151
Fax: 959-2317

I. CONSTITUTIONAL PRINCIPLES FOR A DEMOCRATIC SOUTH AFRICA

ANC envisages a united, democratic, non-racial and non-sexist South Africa, a unitary State where a bill of rights guarantees fundamental rights and freedoms for all on an equal basis, where our people live in an open and tolerant society, where the organs of government are representative, competent and fair in their functioning, and where opportunities are progressively and rapidly expanded to ensure that all may live under conditions of dignity and equality.

A. A united South Africa

When we speak of a united South Africa, we have in mind in the first place the territorial unity and constitutional integrity of our country. South Africa must be seen, as recognized by the international community, as a single, non-fragmented entity including Transkei, Bophuthatswana, Venda and Ciskei.

Secondly, we envisage a single citizenship, nation and a common loyalty. We speak many languages, have different origins and varied beliefs, but we are all South Africans.

Thirdly, all apartheid structures must be dismantled and replaced by institutions of government - central, regional and local - that are truly non-racial and democratic. They must form an integrated and coherent whole, be drawn from all the people and be accountable to the whole community.

Fourthly, there must be a single system of fundamental rights guaranteed on an equal basis for all through the length and breadth of the country. Every South African, irrespective of race, colour, language, gender, status, sexual orientation or creed should know that his or her basic rights and freedoms are guaranteed by the constitution and enforceable by recourse to law.

Fifthly, the flag, names, public holidays and symbols of our country should encourage a sense of shared South Africaness.

A unified South Africa requires a strong and effective parliament capable

of dealing with the great tasks of reconstruction, of overcoming the legacy of apartheid and of nation-building.

We believe that there is a need for a strong and effective central Government to handle national tasks, strong and effective regional government to deal with the tasks of the region and strong and effective local government to ensure active local involvement in handling local issues.

All such governmental structures and institutions shall be based on democratic principles, popular participation, accountability and accessibility. A unified South Africa shall not be an overcentralized, impersonal and overbureaucratized country. The precise relationship between central, regional and local governments can be worked out on the basis of acknowledging the overall integrity of South Africa and the existence of fundamental rights for all citizens throughout the land.

The regions should not be devised as a means of perpetuating privilege, ethnic or racial divisions along territorial zones, but should be based upon the distribution of population, availability of economic resources, communications and urban/rural balance.

National tasks would include external links and representation, defence and the basic security of the country, general economic, fiscal and tax policy, the creation of national policy framework, the furnishing of resources for eradicating racism and racial practices and for the tackling of the vast problems of education, health, housing, nutrition, employment and social welfare.

Regional tasks would include development and the carrying out of the basic tasks of the Government at a regional level, bearing in mind regional particularities and resources.

Without detracting from basic constitutional rights and freedoms, provision could be made for special recognition of languages in the different regions.

Local tasks cover all the day-to-day aspects of living that most directly and intimately affect the citizens in an integrated and non-racial local authority area. The active local involvement of all sections of the population will be necessary in the fulfilment of these tasks.

The central Government has the responsibility for ensuring that there is a common framework of principles and practices applicable to the whole country and for seeing to it that all areas of the country have equitable access to national resources. However, it is not the function of the central Government to involve itself in each and every decision that has to be taken at the regional or local levels. Such functions should clearly be delegated to these authorities and performed by them.

Similarly, when we speak of a united South Africa, we do not envisage the elimination of cultural, linguistic, religious and political differences. On the contrary, we regard the multiplicity of opinions, beliefs, faiths, tastes, cultures and preferences as contributing towards the richness and texture of

South African life. What the new constitution should avoid at all costs is vesting political rights in different linguistic, cultural, ethnic or religious groups.

A free South Africa must therefore ensure that these differences do not become the source of division or conflict or the means of perpetuating and promoting domination or privilege.

The new constitution must consistently and clearly affirm the fundamental principle of equal and undifferrentiated citizenship so that the differences of culture, interest and personality can then express themselves in a constructive, free and non-conflictual way.

B. Democratic

The Government must be democratic in the universally accepted meaning of the term. It must be the Government of the people, by the people, for the people. It must be chosen by the people in free, fair and regular elections. It must be removable if it loses the confidence of the voters. Elections must be based on the principle of universal and equal suffrage on a common voters roll without distinction as to race, language, creed, class, social position, birth or gender. Illiterate voters should not be disadvantaged. The precise method of voting and the electoral system can be negotiated within the framework of these universal principles. ANC favours the system of proportional representation, with regional and national lists.

Secondly, the legislature should be representative of the people as a whole, reflecting such differences of political views and interests as may be present in the community at any particular time.

Thirdly, the institutions of government should not be restricted to any language or to any religious, racial, ethnic or cultural grouping. The central, regional and local government structures, including the law enforcement agencies and the administration of justice, should reflect the composition of South Africa as a whole and draw on the talents and life experience of all. Similarly, they should act in a fair and objective manner towards all, without fear, favour or prejudice.

Fourthly, the Government must be open. Apartheid South Africa has been a highly authoritarian society, characterized by arbitrary decision-making by officials and by excessive secrecy. All South Africans have the right to be informed about the issues and to know what the basis of governmental decision is. There is far too much fear of the Government. We must secure constitutional barriers to detention without trial, to spying on citizens, secret files, dirty-tricks departments, disinformation and the use of government money to promote party political objectives.

Fifthly, Government should be based on the principle of active involvement of the people. The existence of civic associations, religious bodies, ratepayers organizations, trade unions and other independent bodies should be encouraged. Similarly, the Government should colloborate with non-governmental organizations (NGOs), without interfering with their autonomy.

Finally, the Government should reflect the will of the majority, be effective but not all-powerful. It should operate within the framework of the constitution, acknowledging a separation of powers and the existence of fundamental rights and freedoms as guaranteed in a bill of rights.

C. Non-racial

A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions that kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms, it means the affirmation of equal rights for all. It presupposes a South Africa in which every individual has an equal chance, irrespective of his or her birth or colour. It recognizes the worth of each individual.

A non-racial constitution can be adopted rapidly, but a non-racial South Africa would take many years to evolve. Yet, although the massive discrepancies in education, health and living conditions imposed by decades of racial discrimination cannot be eliminated by constitutional declaration, the constitution must provide the positive means to reduce progressively the imbalances and inequalities and to ensure that everybody has an equal chance in life.

D. Non-sexist

The new constitution must reflect a commitment to full, free and equal participation in the new South Africa. Law and practice keep South African women out of their rightful place in helping to build democracy and enable a new nation to evolve, and they deprive them of their human rights as individuals.

The new Constitution must therefore:

(a) Guarantee equal rights for women and men in all spheres of public and private life;

(b) Create mechanisms whereby the discrimination, disabilities and disadvantages to which women have been subjected are rapidly removed;

(c) Give appropriate recognition to reproductive and birth rights;

(d) Guarantee constitutional protection against sexual violence, abuse, harassment or defamation;

(e) Ensure that women are heard in all issues and that they participate actively in all levels of society.

E. Bill of rights

A bill of rights based on universally recognized principles of human rights should form an integral part of the new constitution. In particular, it should include guarantees to all South Africans against the violations of human rights associated with apartheid and stress the principle of the equal

dignity and worth of all South Africans.

The bill of rights should in a clear and unambiguous language guarantee the rights of personal freedom and political expression. It should also protect and enhance rights of the individual to practise her or his religion and culture and speak her or his language. It should acknowledge the importance of securing minimum conditions of decent and dignified living for all South Africans.

It should create mechanisms for enforcing these rights. In particular, the courts should have a primary role in ensuring that the bill of rights is operative. A constitutional court that enjoys the respect of all South Africans, that draws on the experience and talents of the whole population, that is independent and that functions in a manifestly fair and objective fashion, accountable only to the principles of the constitution, should be created.

Similarly, a human rights commission should be established to ensure that violations of human rights are investigated and appropriate remedies found, examine patterns of discrimination and make proposals for their elimination.

Finally, the post of ombudsman should be created to deal with questions of abusive, arbitrary, capricious, discourteous and corrupt exercise of office by any official.

F. Open society

The constitution should guarantee the free articulation of differences within the framework of equal rights and tolerance.

An open society requires guarantees for the free functioning of such NGOs as religious bodies, trade unions, sporting and cultural associations, subject only to respect for fundamental human rights as set out in the constitution.

NGOs should be encouraged to collaborate with the Government in furthering the aims of the constitution, without thereby compromising their identity or independence.

All men and women shall be entitled to all necessary information to enable them to make effective use of their rights as citizens, workers and consumers and to impart such information.

There should be freedom of the press and the media should be open, accessible and respond to all the views, opinions and interests of the community.

G. Civil, defence, police and prison services

The three principal qualities of the civil service, the defence, police and prison service, shall be: representativity, competence and impartiality.

(a) Representativity

All organs of government shall draw on the life experience and talents of all sectors of the community in such a manner as to instil a common South African perspective of public service. The present barriers based on race shall be eliminated and special steps shall be taken to redress patterns of discrimination attributable to apartheid.

(b) Competence

It is in the interest of the population of a free South Africa that the standard and quality of the public service be as high as possible. To attain this goal, and consistent with the principle of representativity, special programmes of training, retraining and advancement shall be undertaken to enable the best South Africans to give the best possible service to all their fellow citizens.

(c) Impartiality

The organs of government shall be accountable to parliament and to the whole community. It is not their function to serve the interests of any party or sectional grouping. Impartiality presupposes a balanced composition of the bodies concerned and a sensitivity to the needs and aspirations of all sections of the community.

There should be adequate control and supervision over the civil service, defence, police and prison service; an effective machinery to investigate complaints against these services and the provision of redress.

(d) Administration of justice

Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way, and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.

In a free South Africa, the legal system shall be transformed to be consistent with the new constitution.

The courts shall be accessible to all and shall guarantee to all equal rights before the law.

H. Guarantees of opportunities for a dignified life for all

A new South Africa can never evolve if the White part of the population lives in relative luxury while the great majority of Black South Africans live in conditions of want, squalor and deprivation.

Appropriate constitutional expression must therefore be found to guarantee basic human rights in relation to nutrition, shelter, education, health, employment and welfare. Government should be under a constitutional duty to work towards the establishment of a guaranteed and expanding floor of

social, economic and educational rights for everybody.

It is particularly important that the constitution facilitate access to education, employment and land, so that people have real and effective opportunities for improving their situation and pursuing happiness.

II. STRUCTURE OF A CONSTITUTION FOR A DEMOCRATIC SOUTH AFRICA

South Africa shall be reconstituted as a non-racial, non-sexist, democratic and unitary republic.

South Africa shall consist of the whole territory recognized by the international community as South Africa and shall include the Transkei, Ciskei, Venda and Bophuthatswana:

(a) Provision will be made for the three branches of government: the executive, legislature and the judiciary;

(b) The head of the executive will be elected president and will also be the head of State. The question that arises is whether the president should be elected directly by the public and vested with greater executive powers, or whether s/he should be elected and answerable to parliament. This is a matter on which there must be greater public debate;

(c) The president will act in consultation with a cabinet of ministers headed by a prime minister. The president will appoint a prime minister and other members of the cabinet;

(d) The president may hold office for a maximum of two terms of five years each. He or she will be subject to removal only by a resolution passed for good cause by a two-thirds majority of the national assembly;

(e) The legislative branch of government will consist of two houses of parliament. The first house of parliament will be the national assembly, which will be elected on the basis of proportional representation by universal suffrage in which all persons will have an equal vote without regard to race, gender, ethnic origin, language or creed. The power of enacting legislation will primarily be vested in the national assembly;

(f) The second house of parliament will be the senate, which will also be elected according to universal suffrage without regard to race, gender, colour, ethnic origin, language or creed. The senate will neither be a corporatist chamber made up of interest groups (youth, labour, women or business, or other groups) nor will it represent ethnic or so-called "community" interests. The electoral system will, however, be different to that adopted for the election of the national assembly, and will make provision for representation on a regional but not on an ethnic basis;

(g) The senate will be the guardian of the constitution, with power to refer any dispute concerning the interpretation or application of the constitution to the appropriate court for its decision and the power to review. Where appropriate, the senate may delay the passage of legislation

passed by the national assembly, but it will not have the power to veto legislation;

(h) Elections for the presidency, national assembly and the senate will be held by secret ballot at periodic intervals of not more than five years and procedures will be enacted to ensure that the elections are genuine and are conducted in accordance with the principles and procedures consistent with those existing in a democracy;

(i) All South Africans shall be entitled to stand for election as president, member of parliament and to other elected offices. Elections will be supervised by an independent electoral commission, and conducted in accordance with the standard design to ensure that they are fair and free.

The national assembly will be elected on the basis of proportional representation. The rationale behind proportional representation lies in the following factors:

(a) It encourages participation by groups that have significant followings. This is more satisfactory than forcing political or subversive activity outside parliament. Fringe parties would be excluded by imposing a threshold of a 5 per cent of the vote;

(b) Votes in access of 50 per cent would count and hence be an inducement to vote in areas where one party is dominant. Similarly, losing parties' votes in those areas would also contribute to their overall performance;

(c) It leads to a more exact political reflection of the popularity of parties;

(d) It avoids the time, expense and accusations of bias in the process of delimiting constituencies. This process can take months or years.

Proportional representation on the basis of a national party list system may present problems. Under such a system, there is no way of ensuring adequate regional or local representation. Party bureaucracies benefit at the expense of local party structures or local sentiment. There is little direct accountability to constituencies.

Accordingly, ANC favours incorporating elements of a national list and regional accountability into the electoral system. This could be done most simply by combining a national list with a regional list. For example, regions could be allocated, say, half of the total seats, to be divided between the different regions in proportion to the registered voters in each region. The remaining half of the seats could be allocated on a national basis. Voters would vote for a party within their region and the regional seats would be allocated between the parties according to the percentages obtained by each party in each region. The second stage would be for the regional votes to be aggregated so as to determine the national percentage of the total vote of each party. Each party would then be entitled to nominiate the additional members needed to make up its total entitlement of seats from its national list.

The end result would be the representation of each party in the assembly in proportion to its total votes, but reflecting a regional choice of members as well. The system requires the electorate to cast one vote only. It will be easy to administer and easy for the voters to follow.

It is recommended that proportional representation, based on the list system, be the preferred system of voting for senate, regional and other elections.

It is important that there be a guarantee of free and fair elections and that procedures be enacted to see to this. It is therefore recommended that the conduct and supervision of all elections be vested in an independent electoral commission to oversee every aspect of elections from the printing of ballot papers to the adoption of regulations for access by parties to the public media, as well as fairness to all political parties by the public media.

There will be an independent judiciary responsible for the interpretation of the constitution and the application of the law of the land. The judicial power will include the power to review and set aside legislation and actions that are unconstitutional. A constitutional court, appointed by the president on the recomendation of a judicial service commission, or by other methods acceptable in a democracy, comprising of judges, practitioners and academics, would be set up.

Provision will be made for elected local and regional government on the basis of universal franchise without regard to race, gender, ethnic origin, language or creed. Local and regional government will exercise delegated powers but will have wide discretions in regard to the priorities to be pursued at these levels, provided always that such policies do not conflict with national policies. Functions presently vested in the provincial administrations will be vested in the regional government. The boundaries of local and regional districts will be determined with due regard to economic and development considerations and without regard to race, colour, ethnic origin, language or creed.

Provision shall be made for one common and equal citizenship acquired by birth, descent and naturalization in accordance with conventional standards. Provision will also be made for the restoration of South African citizenship to persons who have lost it as result of the denationalization process through the homelands policy, or as a result of having gone into exile for political reasons, and provision will also be made for the acquisition of South African citizenship by the spouses and children of such persons.

All languages of South Africa will have equal status. They will be set out in a schedule to the constitution and will include, in alphabetical order, the following: Afrikaans, English, Sesotho, Seswati, Sipedi, Tsonga, Tswana, Venda, Xhosa and Zulu.

The State shall take all reasonable and necessary steps to protect, promote and enhance the language rights of all the people of South Africa in relation to education and culture and in the functioning of the State at local, regional and national levels.

The language policy of the State shall be directed towards promoting and encouraging multilingualism and preventing the use of any language or languages for the purposes of domination or division.

The State shall, however, be empowered to make reasonable provision by law for the use of one or more of the languages in different regions of the country, or for specific purposes.

The question may, of course, be asked whether there should be one official language for the country. If this choice is made, it would mean the demotion of some languages or the promotion of a single one. Also, it would mean that the official language would be one which most of the people either do not speak or do not speak fluently.

It would seem therefore that the most appropriate thing to do is to give equal status to all languages subject to the right of the Government to give primacy to one or more languages in any region or throughout the State as the language of administrative communicaition or judicial record, or for other purposes, either throughout the State or in any area. But everyone should be entitled to use her or his language for purposes of communicating with the public service.

There will be a justiciable bill of rights leaving the way open for legitimate state action but affirming and protecting internationally recognized rights and freedoms, including equality before the law; freedom from detention without trial; protection against arbitrary arrest and detentions; protection against arbitrary search and seizure; prohibition of forced labour; the right to fair trial; prohibition of cruel and unusual punishment; protection of life, including the abolition of the death sentence; protection of women's rights; protection of children; freedom from discrimination; right to privacy; freedom of expression, including a free press; the right to information; freedom of religion and conscience; freedom of movement, including the right of citizens to leave and return to South Africa; trade union rights, including the right to work and the right to strike; the right to form political parties; the right to education, welfare and health care consistent with the needs of the people and the resources of the State; environmental rights; family and cultural rights; and provision for just compensation to be paid for property taken by the State.

We do not propose to discuss here the formulation of each right and the enforcement of rights as this has already been done in a detailed fashion in a discussion paper "The Draft Bill of Rights", published by ANC in November 1990.

Provision will be made for discrimination to be eliminated in substance, as well as in form. At all levels of government, the State will be empowered to pursue policies of affirmative action for the advancement of persons who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices and in order to redress social, economic and educational imbalances in South Africa resulting from such discrimination with special regard to the maldistribution of land and the need for housing. Special provision will also be made to redress the added discrimination that has been suffered by women and the victims of forced removals.

All discriminatory legislation and all other legislation inconsistent with the bill of rights will be invalidated by the bill of rights. All other legislation will remain in force, unless repealed by parliament or set aside by a court under its power of judicial review.

There will be a public service commission charged with the responsibility of overseeing the recruitment, promotion and dismissal to and from posts in the civil service. Such a commission will also be required to implement an affirmative action programme in regard to appointments to senior positions in order to redress existing race and gender disparities. Provision will be made for a representative structuring of the public service, the police service and the defence services and to ensure that the public service will be accountable for its actions.

There will be an independent ombudsman with powers to investigate complaints against members of the public service, including the police and other holders of public and private power, and to investigate allegations of corruption.

The constitution will also make provision for a state of emergency to be declared when the life of the nation is threatened. Such a power will be subject to strict controls by parliament and the judiciary. The constitution will provide for the recognition and protection, as far as possible, of fundamental rights during the period of emergency.

The constitution will be subject to amendment only if a majority of two thirds of the national assembly approve of the amendment or if it is approved by two thirds of the votes cast at a national referendum.

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Courtesy of the Centre against Apartheid